Supreme Court, U. S.
FILED
MAR 3 1980
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-1182

JOHN RUSSO, TRUSTEE
AND
RUSSO DEVELOPMENT CORPORATION,
Appellants,

v.

TOWN OF EAST HARTFORD,
Appellee.

ON APPEAL FROM THE SUPREME COURT OF CONNECTICUT

MOTION TO DISMISS OR AFFIRM APPEAL

JAMES A. KANE, JR., ESQ.
Counsel for Appellee
740 Main Street
Corporation Counsel's Office
East Hartford, Connecticut

February 29, 1980

LEDGE PRESS, PRINTERS, HARTFORD

IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-1182

JOHN RUSSO, TRUSTEE
AND
RUSSO DEVELOPMENT CORPORATION,
Appellants,

v.

TOWN OF EAST HARTFORD,
Appellee.

**ON APPEAL FROM THE
SUPREME COURT OF CONNECTICUT
MOTION TO DISMISS OR AFFIRM APPEAL**

MOTION TO DISMISS OR AFFIRM

The Appellee moves the court to dismiss the appeal herein or, in the alternative, to affirm the judgment of the Supreme Court of Connecticut on the grounds (a) that the questions on which the decision of the cause depends are so unsubstantial; (b) that the federal question(s) sought to be reviewed was not timely or properly raised, or expressly passed on; and (c) that the decision of the cause depends on an adequate non-federal basis as not to need further argument.

I.

STATUTES INVOLVED AND THE NATURE OF THE CASE

This appeal raises the question of the validity of the Zoning Ordinances, Sections 210, 230, 260-266 and 370-378 of the Town of East Hartford and of the General Statutes of the State of Connecticut Sections 22a-36 - 22a-45 (as amended) and Sections 25-4a - 25-9e (as amended).

In November and December of 1972 after notice, publication and hearing, the Appellee, Town of East Hartford enacted certain changes to its Zoning Code which affected the Appellant's property. Basically, what these changes provided was that prior to placing fill on their property, the Appellants were required to obtain a permit from the Appellee town. Additionally, these amendments resulted in a zonal classification of the Appellant's property, and subsequent thereto, the Appellant's property was designated property in a flood plain. A result of this zonal classification was that prior to the Appellants placing fill on their property, they had to obtain a permit from the Appellee town. In neither legislative enactment was filling prohibited, but rather, it was regulated through the requirement of obtaining a permit from the Appellee.

In July of 1972, the State of Connecticut enacted State Statutes 22a-36 - 22a-45 which became known as "The Inlands Wetlands and Water Courses Act". As a result of the State of Connecticut's legislative action, all of the Appellant's property was classified an inland-wetland and as a consequence of this designation, the Appellant, prior to placing fill on his property, had to obtain a permit from the State of Connecticut. In August 1972, pursuant to the authority contained in Sections 25-4a - 25-9e, the State of Connecticut enacted channel encroachment lines across the Appellant's

property, again with the result that prior to placing fill upon their property they had to obtain the approval of the Department of Environmental Protection of the State of Connecticut.

In March 1975, between two and one-half and three years after the enactment of zoning regulation changes and the Connecticut State Statutes, the Appellee town pursuant to Title 8 of the Connecticut General Statutes condemned and took title to the Appellants' property.

B. *The Proceedings Below*

Subsequent to the condemnation of the Appellants' property, the Appellants appealed the compensation paid to the Connecticut Superior Court, where the matter was referred to a State referee, who exercising the powers of the Connecticut Superior Court, rendered judgment reassessing the damages, whereupon the Appellants appealed to the Connecticut Supreme Court which reaffirmed the trial court's decision, see Connecticut Law Journal Vol. XLI, page 1 dated November 20, 1979.

II.

ARGUMENT

A. THE CASE PRESENTS NO SUBSTANTIAL QUESTION NOT PREVIOUSLY DECIDED BY THIS COURT.

Appellee would submit that the rationale of *Penn Central Transportation, et al* v. *City of New York, et al,* 438 U.S. 104, 57 L.Ed.2d 631 (1978) is dispositive of the Appellant's appeal. As this Court stated in *Penn Central, supra* at 125:

> ". . . in instances in which a State tribunal reasonably concluded that 'the health, safety, morals or general welfare' would be promoted by prohibiting particular

contemplated uses of land, this Court has upheld land use regulations that destroyed or adversely affected recognized real property interests. See *Nectow* v. *Cambridge*, 277 U.S. 183, 188 (1928) Zoning Laws are, of course, the classic example, see *Euclid* v. *Ambler Realty Co.*, 272 U.S. 365 (1927) . . ."

In reaching its decision, the Connecticut Supreme Court, after citing this Court's opinion in *Goldblatt* v. *Hempstead*, 369 U.S. 590, 592, 82 S. Ct. 987 (1961), decided that the zoning regulation changes enacted by the Appellee Town, e.g. Sections 210, 230, 260-266 and 370-378 in 1972 and Connecticut General Statutes Sections 22a-36 - 22a-45 (as amended) and Sections 25-4a - 25-9e (as amended) clearly showed that a public purpose was served by their enactment, and that they were a valid exercise of the State and Town's police powers.

Appellants contend that enactment of these ordinances and statutes in 1972 constituted a "taking" because they allegedly diminished the fair market value by more than 96%. The Appellee does not herein agree that the fair market value of the Appellants' property was decreased by 96%, however, Appellee would submit that this court in the *Euclid* v. *Ambler Realty Co.*, *supra* and *Hadacheck* v. *Sebastian*, 239 U.S. 394 (1915) cases clearly established the proposition that land use regulations, which are reasonably related to the promotion of the general welfare, which cause the diminution in value of property, standing alone cannot establish a taking.

The Trial Court and the Connecticut Supreme Court held that from the time of enactment of the Town's zoning ordinances and the applicable State of Connecticut Statutes in 1972 to the date of the taking in 1975, that the Appellants had a regulated permitted use, that is, they could place fill upon their property after acquiring the necessary permits

from the Town of East Hartford and the State of Connecticut. It is undisputed, and the Trial Court and the Connecticut Supreme Court so held, that from the time of enactment of the Town Zoning Ordinance and the Connecticut State Statutes in 1972 until the date of taking in 1975, that the Appellants never applied for or requested a fill permit from the Town of East Hartford or the State of Connecticut.

The Appellant hence is in the position of claiming that a taking occurred upon enactment of the Town Ordinances and the State Statutes in 1972 because these Ordinances and Statutes restricted the use to which they could put their property. However, since they had never requested or applied for a permit, they were and are unable to prove that, in fact their use had been restricted.

Ergo, the Appellant's position was and is, by the proof they offered, that a claimed diminution in value of their property constituted a taking. This position has been repeatedly held by this Court to be untenable.

B. THE CASE PRESENTS FEDERAL QUESTIONS SOUGHT TO BE REVIEWED THAT ARE NOT TIMELY, PROPERLY RAISED, NOR WERE THEY PASSED UPON BY THE CONNECTICUT SUPREME COURT.

Since the case of *Chesapeake and Ohio Railway Company* v. *McDonald, Administrator*, 214 U.S. 191, at 193 (1909), it has been well established that:

"This court; on an appeal from a State Court, cannot consider an alleged Federal question, when it appears that the Federal right thus relied upon had not been by adequate specification called to the attention of the State Court and had not been by it considered, not

being necessarily involved in the determination of the cause. *Green Bay and Miss. Canal Co.* v. *Patten Paper Co.*, 172 U.S. 52, 67; *Oxley State Co.* v. *Butter Co.*, 166 U.S. 648, 654, 655 and cases cited."

And in *Hiawassee Power Co.* v. *Carolina Tenn. Co.*, 252 U.S. 341, at 343 (1919) it was held that when the assignments of error in the State Court do not refer in any way to the Federal Constitution, nor was a Federal Constitutional question presented to the State Supreme Court for it to pass on, then an issue of substantial character was not presented to this Court.

A study of this Appellant's assignment of errors in the appeal to the Connecticut Supreme Court will show that they made no claim to, or specified any section of the U.S. Constitution or amendment thereto, which Appellants claimed the enactments of the Town's Zoning Ordinance and the State Statutes violated.

The Connecticut Supreme Court noted that the Appellants made some type of Constitutional claim, and disposed of this claim by stating that "other than the claim itself that the regulations are vague, there has been no showing of vagueness in the findings or in the argument." Appellee would further point out that the reference to unconstitutionality could, and probably was, to the Constitution of the State of Connecticut.

In sum., the Supreme Court of the State of Connecticut based on the trial court's findings, the Appellant's assignment of errors and the Appellant's arguments, never had placed before it, by the Appellant, any Federal Constitutional question, and in fact decided the cause on other issues.

C. THE CASE PRESENTS A DECISION OF THE CAUSE WHICH DEPENDS ON AN ADEQUATE NON-FEDERAL BASIS.

A reading of the Trial Court's findings and the opinion of the Connecticut Supreme Court make it clear that their decisions did not rest on anything other than Appellant's own failure to exercise their administrative and legislative remedies.

The case in question is a condemnation, and the basic issue was the amount of compensation the Appellants were entitled to. The law of the land is that compensation is determined by the fair market value of the property on the *day of the taking* and that fair market value is determined by what a willing buyer would pay a willing seller.

On the day of the taking, the Appellants' property was zoned a flood plain by the Town's Zoning Regulations and an inland/wetland by the State of Connecticut. This was undisputed testimony, from the Appellants' own expert witnesses, that if the Appellants' property was in a flood plain and an inland/wetland, then the fair market value of the property was $47,500.00.

The Connecticut Supreme Court found that the Appellants' Town and the State of Connecticut had properly enacted these regulations and statutes in a valid exercise of their police powers. It further found that the Appellants never exhausted their administrative or judicial remedies upon the application of these regulations and statutes to their property in 1972, despite the fact that there were stated appeal provisions and judicial remedies within these regulations and statutes. It further found that the Appellants never filed or requested a permit to fill their property and hence failed to prove that enactment of these regulations

and statutes between 1972 and 1975, the day of the taking, had or would have prevented them from filling their property.

Clearly the decision of this cause by the Connecticut Supreme Court was on the basis of an interpretation of the State of Connecticut's condemnation procedures and certain State Statutes and Town Zoning Regulations. There was no federal constitutional cause and none considered by the Connecticut Supreme Court. As has been established since *Hooker* v. *Los Angeles*, 188 U.S. 314, 320 (1902), a decision of a State Court in condemnation proceedings is not reviewable in the Supreme Court of the United States if no claim was advanced under the Constitution of the United States.

III.

CONCLUSION

WHEREFORE, Appellee respectfully submits that the questions upon which this cause depends are so unsubstantial, and/or, that the federal question sought to be reviewed was not timely brought, properly raised, nor expressly passed upon, and/or, the decision of the cause depends on an adequate non-federal basis so as not to need further argument, and the Appellee respectfully moves the Court to dismiss this appeal, or in the alternative, to affirm the judgment entered in the case by the Connecticut Supreme Court.

Respectfully submitted,

JAMES A. KANE, JR.
Counsel for Appellee
740 Main Street
Corporation Counsel's Office
East Hartford, Connecticut

PROOF OF SERVICE

All parties required to be served pursuant to Rule 33 have been served in accordance therewith.
February 29, 1980

JAMES A. KANE, JR.